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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

TIMOTHY DUFOUR AND KENNETH
TANNER, INDIVIDUALS, ON THEIR OWN
BEHALVES AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
PLAINTIFFS,

VS. NO. C 09-03770 CRB
BE., LLC, DYNAMIC SHOWCASES,
LLC, CALIFORNIA LIMITED LIABILITY
COMPANIES, MONTEREY FINANCIAL
SERVICES, INC., MTS HOLDINGS
GROUP, INC., CALIFORNIA CORPORATIONS,
1901 CO., A NEVADA CORPORATION, BE
MARKETING LIMITED, A PRIVATE LIMITED
COMPANY REGISTERED IN ENGLAND AND WALES,
ERIK DESANDO, BARRY FLACK, JACOB STEINBECK,
VITALY RASHKOVAN, AND DOES 1-100,
INCLUSIVE,

SAN FRANCISCO, CALIFORNIA
DEFENDANTS. FRIDAY
MAY 28, 2010
10:00 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: PRESTON LAW OFFICES
21001 NORTH TATUM BLVD.
SUITE 1630-430
PHOENIX, AZ. 85050
866-509-1197

BY: ETHAN MARK PRESTON, ESQUIRE

FURTHER APPEARANCES ON NEXT PAGE

REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR

OFFICIAL REPORTER - US DISTRICT COURT
COMPUTERIZED TRANSCRIPTION BY ECLIPSE

FURTHER APPEARANCES:**FOR THE DEFENDANT MONTEREY FINANCIAL SERVICES:**

CALL & JENSEN

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SUITE 700

NEWPORT BEACH, CALIFORNIA 92660

BY: **MATTHEW R. ORR, ESQUIRE****MARK TEU, ESQUIRE****FOR DEFENDANT JACOB STEINBECK:**

KAWAHITO & SHRAGA, LLP

11845 WEST OLYMPIC BOULDEVARD

SUITE 665

LOS ANGELES, CA. 90064

310-593-2520

BY: **DAVID SHRAGA, ESQUIRE**

1 MAY 28, 2010

10:00 O'CLOCK A.M.

2
3 P R O C E E D I N G S

4 THE CLERK: CALLING CASE C 09-3770, TIMOTHY DUFOUR
5 VERSUS BE, LLC.

6 APPEARANCES, COUNSEL.

7 MR. PRESTON: YOUR HONOR, ETHAN PRESTON ON BEHALF OF
8 THE PLAINTIFFS.

9 MR. SHRAGA: GOOD MORNING, YOUR HONOR. DAVID SHRAGA
10 ON BEHALF OF JACOB STEINBECK.

11 MR. ORR: GOOD MORNING, YOUR HONOR. MATTHEW ORR AND
12 MARK TEU ON BEHALF OF MONTEREY FINANCIAL SERVICES.

13 THE COURT: DID MONTEREY MAKE ANY ARGUMENT IN SUPPORT
14 OF THE DISMISSAL OF THE CLAIMS UNDER THE ROSENTHAL FAIR DEBT
15 COLLECTION PRACTICE ACT OF THE CALIFORNIA CREDIT REPORTING ACT?

16 MR. ORR: NO, YOUR HONOR. WE THINK THAT'S PROBABLY
17 THE ONLY CLAIMS THAT SHOULD GO FORWARD IN THIS LITIGATION
18 AGAINST MONTEREY.

19 THE COURT: OKAY. ALL RIGHT.

20 WELL, LET ME TELL YOU AFTER READING ALL OF THIS WHAT
21 I INTEND TO DO. AND I THINK THAT IT WOULD BE USEFUL FOR THE
22 COURT TO ISSUE A WRITTEN OPINION ON A NUMBER OF THESE THINGS SO
23 YOU UNDERSTAND WHERE TO GO.

24 THE CASE DOES SURVIVE; THAT THE CAUSE OF ACTION AS TO
25 DECEIT UNDER ONE OF THE THEORIES UNDER THE UNIFORM -- ON THE

1 UNFAIR COMPETITION LAW, 17200, AND THE RICO ACTION WOULD SURVIVE
2 AS TO BOTH DEFENDANTS.

3 HOWEVER, THE BREACH OF THE FIDUCIARY DUTY AND THE
4 AFTSA CLAIMS WILL BE DISMISSED. AND IN LIGHT OF THE
5 REPRESENTATION MADE BY COUNSEL, THE ROSENTHAL FAIR DEBT
6 COLLECTION PRACTICE ACT AND THE CALIFORNIA CREDIT REPORTING ACT
7 WILL SURVIVE, AS WELL.

8 SO I WILL ISSUE AN OPINION SETTING FORTH THE REASONS
9 WHY SOMETHING HAS SURVIVED AND WHY THE OTHER MATTERS HAVE BEEN
10 DISMISSED. I HAVE NO CONFIDENCE THAT THIS CASE WILL SURVIVE MUCH
11 LONGER, BUT, YOU KNOW, THE PARTIES WILL HAVE TO CONDUCT
12 DISCOVERY. AND IF IT'S APPROPRIATE TO FILE A MOTION FOR SUMMARY
13 JUDGMENT, THEY CAN DO SO.

14 BUT THAT'S WHY I THINK IT'S IMPORTANT FOR AN ORDER TO
15 GO OUT DEFINING EXACTLY WHAT THE SCOPE OF THE CASE WILL BE GOING
16 FORWARD, BECAUSE IT'S NOT AS BROAD AS I'VE ESSENTIALLY STATED
17 IT.

18 **MR. ORR:** I THINK THAT'S RIGHT, YOUR HONOR.

19 **MR. PRESTON:** YOUR HONOR, THESE DISMISSALS ARE NOW
20 WITH PREJUDICE?

21 **THE COURT:** YES.

22 **MR. PRESTON:** OKAY. DOES YOUR HONOR ENTERTAIN
23 APPLICATIONS TO MAKE SUCH INCOMPLETE DISMISSALS A FINAL JUDGMENT
24 SUCH THAT THEY ARE SUBJECT TO APPEAL UNDER THE --

25 **THE COURT:** IT WOULDN'T HAPPEN. THE NINTH CIRCUIT

1 ISN'T GOING TO TAKE IT. YOU MEAN, AN INTERLOCUTORY APPEAL ON
2 SOME OF THESE ISSUES? NO. THERE'S NO LIKELIHOOD OF THAT.

3 I MEAN, I THINK WHAT YOU HAVE TO DO IS YOU HAVE TO
4 FIGURE OUT WHY THIS CASE IS BETTER OFF HERE THAN IT WOULD BE IN
5 STATE COURT.

6 THESE ARE ESSENTIALLY STATE CLAIMS FOR THE MOST PART.
7 I THINK YOU HAVE FASHIONED A FEDERAL CLAIM, SO I'M NOT SAYING
8 THAT. I AM SAYING YOU HAVE A RIGHT TO BE HERE. BUT I WOULD
9 THINK THAT THIS IS FAR MORE APPROPRIATE TO BE LITIGATED IN STATE
10 COURT THAN IT WOULD IN FEDERAL COURT, BUT THAT'S UP TO YOU.

11 **MR. ORR:** WELL, AND YOUR HONOR UNDERSTANDS THAT
12 THERE'S THE LA ACTION IN STATE COURT, THAT IS NOW PENDING.

13 **THE COURT:** YES. WELL, THERE IT IS. BUT YOU'RE
14 ENTITLED TO PROCEED HERE.

15 **MR. PRESTON:** THANK YOU, YOUR HONOR.

16 **THE COURT:** WELL, I'M NOT SURE YOU OUGHT TO THANK ME,
17 BUT THERE IT IS.

18 SO I'LL WRITE OUT -- WRITE MY REASONS.

19 **MR. ORR:** YOUR HONOR, CAN MONTEREY BE HEARD JUST WITH
20 RESPECT TO THE RICO CAUSE OF ACTION?

21 **THE COURT:** SURE. GO AHEAD.

22 **MR. ORR:** THE ONLY ISSUE THAT WE HAVE WITH THE RICO
23 CAUSE OF ACTION -- OR I GUESS ONE OF THE ISSUES WE HAVE WITH THE
24 RICO CAUSE OF ACTION, REALLY, IS THAT IT APPEARS TO CONFLATE THE
25 ACTS THAT ARE UNDERPINNING OR THAT EQUATE WITH THE RICO CONDUCT,

1 BASICALLY.

2 THEY SEEM TO CONFLATE THAT WITH THE ACTUAL
3 ENTERPRISE. THE ONLY ALLEGATIONS OF CONDUCT THAT PLAINTIFFS
4 HAVE ALLEGED IN THEIR COMPLAINT IS ONE AND THE SAME WITH THE
5 CONDUCT THAT ACTUALLY FORMS THE ENTERPRISE, WHICH IS MONTEREY
6 COLLECTING AMOUNTS FROM THESE CONSUMERS AND THE ACTUAL ACT THAT
7 FORMS THE BASIS FOR THEIR RICO LIABILITY.

8 AND THE CASE LAW IS PRETTY CLEAR THAT YOU CAN'T HAVE
9 THE SAME ACTS CONSTITUTING THE VIOLATION OF RICO BE THE SAME
10 CONDUCT THAT ACTUALLY FORMS THE ENTERPRISE ITSELF. AND WHILE
11 THAT WASN'T MADE EXTREMELY CLEAR, WHICH IS WHY I WANTED TO
12 ADDRESS IT HERE IN COURT, IN OUR REPLY PAPERS, THERE IS CASE LAW
13 ON THAT POINT THAT DOES SUPPORT THAT PROPOSITION.

14 AND I THINK THAT'S THE CASE HERE.

15 **MR. PRESTON:** YOUR HONOR, THAT ISSUE IS CONTROLLED BY
16 MICROSOFT -- I'M SORRY -- ODOM VERSUS MICROSOFT, WHICH KIND OF
17 IN A VERY STRAIGHTFORWARD AND VERY SOMEWHAT DRAMATIC TERMS
18 EXPLAINED WHAT IS NEEDED TO ALLEGE AN ENTERPRISE.

19 IN THIS CASE, THERE ARE TWO ONGOING BUSINESSES. BE
20 THAT SENT OUT E-MAILS, PRODUCED TELEVISION SHOWS, HAD AN
21 ACCOUNTS RECEIVABLE DEPARTMENT, HAD A FINANCING DEPARTMENT.

22 MONTEREY IS ALSO ON THE WHOLE A LEGITIMATE BUSINESS,
23 THAT FINANCED THESE CONTRACTS WHICH ARE IN THIS PARTICULAR CASE
24 ILLEGAL.

25 IT'S NOT THE CASE THAT -- AND THE COMPLAINT IS MUCH

1 LONGER THAN I'D LIKE IT TO BE, BUT --

2 **THE COURT:** IT WILL BE SHORTER AFTER I GET FINISHED
3 WITH IT.

4 **MR. PRESTON:** I MAY THANK YOU THEN.

5 THERE REALLY IS MORE THAN JUST THE PATTERN OF
6 RACKETEERING ACTIVITY THAT HAS BEEN ALLEGED IN THE COMPLAINT.

7 **THE COURT:** OKAY. I'LL WRITE SOMETHING.

8 THANK YOU.

9 **MR. ORR:** THANK YOU.

10 **MR. PRESTON:** THANK YOU, YOUR HONOR.

11 YOUR HONOR, SHOULD WE ADDRESS THE SCHEDULING ISSUE?

12 **MR. ORR:** SURE.

13 **THE COURT:** WELL, SCHEDULING, I TRIED TO FIGURE OUT
14 WHETHER -- TO WHAT EXTENT WE CAN FOCUS DISCOVERY. I'M NOT SURE
15 YOU CAN TOO MUCH, BUT ONCE YOU GET THE OPINION YOU SHOULD TAKE A
16 LOOK AT IT.

17 AND MAYBE I SHOULD GIVE YOU ANOTHER CASE MANAGEMENT
18 CONFERENCE DATE THAT YOU CAN COME IN AFTER YOU'VE READ IT AND
19 FIGURED OUT WHERE YOU ARE GOING, AND THEN WE CAN SET SOME OTHER
20 DATES.

21 SO WHY DON'T YOU COME BACK HERE JUNE 25TH AT 8:30?

22 **MR. PRESTON:** TYPICALLY, PARTIES SUBMIT A DISCOVERY
23 PLAN PRIOR TO A CMC.

24 **THE COURT:** WELL, YOU'LL HAVE THE ORDER SHORTLY, AND
25 THEN --

1 **MR. PRESTON:** I SEE. YOUR HONOR IS GOING TO ADDRESS
2 THE PARTICULARS.

3 **THE COURT:** YES.

4 **MR. PRESTON:** ALL RIGHT.

5 **THE COURT:** SO YOU CAN SEE WHAT IT IS, AND YOU CAN
6 FIGURE OUT WHERE TO GO.

7 **MR. ORR:** THANKS SO MUCH, YOUR HONOR.

8 **THE COURT:** OKAY. THAT'S IT?

9 **THE CLERK:** YES, YOUR HONOR, EXCEPT THE NEXT MATTER
10 AT 10:30.

11 (THEREUPON, THIS HEARING WAS CONCLUDED.)

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1 CERTIFICATE OF REPORTER

2 I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY
3 THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED
4 SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO
5 TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE
6 RECORD OF SAID PROCEEDINGS.

7 I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR
8 ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING
9 PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE
10 OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

11 THE FEE CHARGED AND THE PAGE FORMAT FOR THE
12 TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL
13 CONFERENCE.

14 IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS
15 23RD DAY OF AUGUST, 2010.

16
17
18
19 _____
20 S/S/ KATHERINE WYATT
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